

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

State of the Market for)	
Local and Advanced)	WT Docket No. 99-217
Telecommunications Services)	
In Multiple Tenant Environments)	

COMMENTS OF EVEREST MIDWEST LICENSEE LLC
DBA EVEREST CONNECTIONS

Everest Midwest Licensee, LLC dba Everest Connections (“Everest”) is a broadband service provider currently offering service voice, video and high speed Internet service over its own hybrid fiber coaxial infrastructure in Lenexa, KS and to several hundred customers in one neighborhood of Kansas City, MO.

To date one of our primary challenges has been obtaining access to multiple dwelling units to fulfill the obligations of our franchises and Sec. 621 of the Communications Act of 1934, as amended¹. Everest has achieved limited success in gaining access to these environments. Everest appreciates the opportunity to provide comments in this docket.

Everest has requested access to approximately 65 multiple dwelling unit complexes comprising approximately 14,000 units. Everest has been successful at obtaining access to five complexes, which comprise approximately 1400 individual units. While the incumbent telephone service provider, Southwestern Bell, has exclusive agreements with a number of complexes, Everest, as a broadband service provider must contend with exclusive agreements that have been signed with cable and satellite providers as well. It is simply not economical for Everest to build into a complex if it

cannot provide its full suite of telecommunications, cable and high speed Internet services to tenants.

Everest is aware of one complex where multiple wireline carriers offering telecommunications services signed access agreements with a provider other than the incumbent. The alternate provider, Birch Telecom, provides service using unbundled loops purchased from the incumbent, Southwestern Bell.

In the cases where Everest has been successful at negotiating an agreement with a property owner, Everest has found that the average length of time from an initial request for access to service customers who reside in multiple dwelling units until the successful conclusion of contract negotiations with the property owner is six months. When property owners are amenable to allowing Everest to serve their tenants, one of the most challenging negotiation points has been the compensation the owner requires to allow Everest to serve. Additionally Everest must provide the owner with extensive drawings for post wiring architecture.

Everest has received flat denials from property owners in 11 complexes comprising approximately 2800 units. These owners are not interested in having an alternative provider enter their buildings. Everest has had trouble even opening a dialog with owners of 25 complexes who control approximately 6500 units. Many will not return telephone calls. Others that do return calls indicate that they believe they are unable to enter into discussions with Everest because they are bound by contracts with incumbent providers.

Since Everest is a broadband service provider, it must not only contend with exclusive arrangements with the incumbent telecommunications provider; it also must

¹ 47 U.S.C.541.

contend with exclusive service agreements the owner has executed with the incumbent cable provider and satellite provider. In some cases the incumbent telephone company has teamed up with a satellite provider to obtain exclusive service arrangements.

Many of these contracts were signed subsequent to passage of the Telecommunications Act of 1996, and run for 10-year terms or terms concurrent with the incumbent's franchise and any renewals thereafter. Many of the franchises themselves do not expire until 2010.

Everest has not found any owners who are willing to exercise their rights under the FCC's Cable home run wiring rules to buy back home run wires installed by the incumbent. Similarly, Everest has ended up wiring complexes because an owner was reluctant or unwilling to request that Southwestern Bell relocate its minimum point of entry to the curb. Southwestern Bell was insisting that Everest purchase a subloop from the curb to the utility closet, and the nonrecurring charge for that subloop was 50 percent higher than Everest's cost to install its own facilities.

Kansas statutes² prohibit a landlord from "interfering with or refusing to allow access or service to a tenant by a communication or cable television service duly franchised by a municipality." Although the FCC has previously included Kansas in its list of "mandatory access" states, as a practical few if any tenants have the financial wherewithal to litigate against a multi-system operator. A landlord, faced with the choice of a request from a tenant for service from a competing provider or a lawsuit from a national MSO or RBOC will simply tell the tenant that that complex does not offer the competitor's service. If the landlord wants to do business with Everest but has an exclusive agreement with an incumbent provider, one of the terms the owner seeks from

Everest is indemnification in the event that the owner is sued by the incumbent. This is yet another barrier to entry for a competitive provider, such as Everest.

Everest has been successful at gaining sponsors for bills in both Kansas and Missouri that would allow a competing provider to gain access to a building under the same terms and conditions that an incumbent provider has been granted access. It appears at this time that the legislation will not advance out of committee in Kansas. In Missouri, the House Utilities committee passed a bill that would prohibit any new exclusive agreements. The bill would also prohibit renewals or extensions of existing agreements. The bill would create April 1, 2005, as a sunset date for exclusive access and exclusive service provisions in existing agreements. If, prior to April 1, 2005, an owner wanted to opt out of the exclusive access or exclusive service provisions of an agreement, the owner could do so, without penalty. The bill also provides that the owner would be compensated for permitting entry in an amount no less than what he is currently receiving under an existing agreement with an incumbent provider. If the compensation issue could not be worked out, an arbitrator selected by the parties or appointed by the court, with the cost to be borne by the competitive provider. Notwithstanding these changes, the real estate trade organizations have continued to oppose this measure. Attached to this pleading is an article that appeared in the Kansas City Star on March 7, 2002.

In sum, notwithstanding the best practices proposed by the real estate industry, Everest continues to experience many barriers to gaining access to residential multi-tenant environments. What is perhaps most disturbing is that some agreements between property owners and incumbent providers have been executed subsequent to October 25,

² K.S.A. 58-2553(a)(5).

2000, when the Commission issued its Order and Further Notice of Proposed Rulemaking. In our own Kansas City market, the incumbent provider has offered property owners revenue sharing in return for an exclusive right to serve after Everest was awarded its franchises (commencing in May 2000). In one apartment complex, where Everest was performing its post-wire construction late in 2001, the incumbent went door-to-door and offered tenants 40 percent discounts if they agreed to a one year contract.

Conclusion

Everest appreciates the opportunity to provide comments in this docket and urges the Commission to explore creative solutions to what is an ongoing problem notwithstanding the real estate industry's attempt to provide guidelines to its member firms concerning best practices.

Respectfully submitted,

Everest Midwest Licensee, LLC dba
Everest Connections Corporation

Rachel Lipman Reiber
Vice President of Regulatory and Government Affairs
4740 Grand, Suite 200
Kansas City, MO 64112
816.714.2972 Voice
816.714.2995 FAX

Dated: March 8, 2002

Posted on Thu, Mar. 07, 2002
THE KANSAS CITY STAR.

Exclusive agreements eliminate some cable companies from competition

By SUZANNE KING
The Kansas City Star



Joe Ledford/The Kansas City Star
David Wakefield, a multiple dwelling unit technician for Everest Connections Corp., wires a network for cable television for an apartment building at the Deer Creek Apartments, 129th and Metcalf Ave., in Overland Park.

More often than not, when Everest Connections has tried to sell its alternative cable and telephone services to apartment dwellers in the Kansas City area, it has been turned away.

Apartment complex owners under contract with other service providers have been unwilling -- or unable -- to open their doors to Everest, the area's only cable competitor and one of a few companies selling competitive local phone service to residential customers.

Everest officials estimated that four out of five complex owners had denied the company access, most often citing exclusive agreements with Time Warner Cable.

"I think it's a restraint of trade and I think it's discriminatory," Rachel Lipman Reiber, Everest's vice president of regulatory and governmental affairs, said of the exclusive contracts, some of which she said run indefinitely.

Everest, whose financing comes from UtiliCorp United Inc., is pushing legislation in Jefferson City and Topeka to prevent apartment owners from signing exclusive deals with longtime monopoly service providers, such as Time Warner.

Everest is providing service to more than 4,000 residential customers in Lenexa and other limited parts of the area. The company, whose offerings of cable, local and long-distance telephone and high-speed Internet services are priced from \$49.95 to \$129.95, plans to build its network to reach the entire Kansas City area.

The company's network passes 12,000 residents in Lenexa. It has begun construction in south Kansas City, near Interstate 435 and Holmes, and barely moved into Overland Park. The company expects to move farther into Kansas City and Overland Park this year, and will begin construction in Shawnee.

With more than a quarter of all housing units in multidwelling apartment buildings, Everest officials said, they cannot afford to be blocked out of that market.

"If we're going to be successful, we do need to have access to that segment of housing," Reiber said.

Bob Niles, president of Time Warner Cable in Kansas City, said his company was not actively lobbying against the bills Everest was pushing in Kansas and Missouri. But he said the company was against any law that could lead to the government overstepping its bounds.

"If we have an agreement that grants us exclusive rights to a property, we'd be concerned about that being undermined by a law to the contrary," Niles said.

First in line opposing the Missouri and Kansas bills are apartment owners, who say the legislation would amount to "forced access." Apartment owners associations contend that the bills and similar legislation throughout the country would put the government where it doesn't belong.

"It's an individual property rights issue," said Douglas Price of Price Brothers Development, which owns apartment complexes in the Kansas City area. "Owners ... want to be able to say who comes in and comes out rather than having the government telling us what to do."

Price said his company believed in opening its properties to competitors. Everest has already won business from residents in 100 of the 568 units at its Chesapeake Estates Apartments in Lenexa. Everest also has started wiring an apartment complex that Price Brothers owns in Overland Park.

But Price stands firmly against legislation that would prohibit property owners from signing exclusive deals if they chose to.

"The owners of a house should be allowed to let who they want in," Price said.

In addition to the property rights concerns, apartment owners said there were economic reasons behind their opposition.

Sometimes they can negotiate better rates for tenants or higher commissions for themselves if they sign exclusive deals with an Internet, telecommunications or cable firm.

"Under this law, that type of contract would be absolutely prohibited," said Bob Wise, executive vice president of the Missouri Apartment Association.

The legislation also has the potential to create chaos for owners and tenants, Wise said. "If you have a situation where any company can come in and solicit any tenant, how does the owner keep track of what's going on where?" Wise said. "You've got a dozen different companies drilling holes in the walls."

The legislation also could create "turf wars" and the potential for one carrier to be drummed out of business.

"It is the competitor's problem," said Jim Arbury, vice president of the National Multi Housing Council/National Apartment Association. "But if you've got that company in your apartment complex and all of a sudden they go bankrupt, you've got a lot of unhappy residents who can't get TV."

Legislation to prohibit apartment owners from signing exclusive contracts has been an issue for at least a half-dozen years. But it's not always competitive cable or phone companies, such as Everest, fighting for access.

Often this type of legislation has been supported by large cable monopolies who are trying to prevent apartment owners from signing exclusive deals with satellite television providers.

Property owners have won the fight in at least 25 states.

Hearings on the local bills were held earlier this month in Jefferson City and Topeka, but the bills are nowhere near being signed into law.

Kansas Sen. Karin Brownlee, who heads the Commerce Committee, said she was hesitant to vote for a bill that could interfere with a legal, contractual agreement.

But Everest officials said they were willing to revise language in the proposed legislation to help allay such concerns.

The company would like the law to prohibit new exclusive agreements -- not existing agreements -- and establish a sunset date of April 1, 2005, on existing exclusive contracts that have no expiration date.

Most of all, Everest said, the company would like the opportunity to compete for the business of all residents -- even if they live in an apartment building whose management has signed a deal with Time Warner.

"We would like (the law) to allow both companies to serve, and let the tenants choose," Reiber said.

Bob Newton, who owns Pinnacle Pointe Apartments, a 160-unit apartment complex in Lenexa, said he was glad to have a competitor knock on his door last year. But letting Everest into his complex wasn't as easy as opening the door.

Time Warner had installed the inside wiring when the complex was constructed, so Everest had to come in with its own wiring.

Newton maintains that the upheaval involved in Everest's rewiring was worth it. He gets a commission from both companies now, but Time Warner had not paid one when it was the only provider. The situation is better for residents, too, he said. "Now tenants have two choices."

To reach Suzanne King, technology and telecommunications reporter, call (816) 234-4336 or send e-mail to sking@kcstar.com.